Acquisition Reform Partnership Day

Leading & Embracing Change: Institutionalizing & Accelerating Acquisition Reform

Ogden Air Logistics Center

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Acquisition Reform: Can Government & Industry Adjust?

Fundamental Reform Concept:

Real reform is rarely judged by the change in words found in policy and regulation. Genuine reform is most often associated with the ***ability to culturally transform*** the practices and processes of the users.

THIS IS NOT CAMELOT!

Process Transformation Barriers

- Balancing efficiency, workforce reductions and public sector accountability.
- Reward the risk takers and empower individuals to exercise sound judgement. Avoid the IG mentality which turns errors into future inaction.
- Training and Education are critical; you cannot use ineffective processes with fewer people and accomplish the task.

If there were an acquisition reform bumper sticker, it would read:

Faster, Cheaper, Better

- Output measures are critical to assess reform results.
- Today, GAO finds that: protests are down, procurement lead-time is improving and the use of simplified acquisition procedures are up.
- Cycle time reduction is a “must have” output objective.

Technology = 18 months

DOD = 3 years!

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Prime Contractors in Defense Market Sectors (1990 - 1998)

Sector	Reduction	1990 Contractors	1998 Contractors
Tactical Missiles	13 to 4	Boeing, Ford Aerospace, GD, Hughes, Lockheed, Martin Loral, LTV, Martin Marietta, McDonnell Douglas, Northrop, Raytheon, Rockwell, TI	Boeing Lockheed Martin Northrop Grumman Raytheon
Fixed Wing Aircraft	8 to 3	Boeing, GD, Grumman, Lockheed, LTV-Aircraft, McDonnell Douglas, Northrop, Rockwell	Boeing Lockheed Martin Northrop Grumman
Expendable Launch Vehicles	6 to 2	Boeing, GD, Lockheed, Martin Marietta, McDonnell Douglas, Rockwell	Boeing Lockheed Martin

Prime Contractors in Defense Market Sectors (1990 - 1998)

Sector	Reduction	1990 Contractors	1998 Contractors
Surface Ships	8 to 5	Avondale, Bath Iron, Bethlehem Steel, Ingalls Shipbuilding, NASSCO, Newport News, Tacoma, Tampa	Avondale, Bath Iron, Ingalls Shipbuilding, NASSCO, Newport News
Tactical Wheeled Vehicles	6 to 4	Am General, Harsco, GM Canada, Oskosh, Stewart & Stevenson, Teledyne Cont. Motors	Am General, GM Canada, Oskosh, Stewart & Stevenson
Tracked Combat Vehicles	3 to 2	FMC, General Dynamics, Harsco	General Dynamics, United Defense LP
Strategic Missiles	3 to 2	Boeing, Lockheed, Martin Marietta	Boeing, Lockheed

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Approaches to maintain effective competition in the defense marketplace with fewer and larger commercial entities:

- Reduce defense marketplace barriers by regulatory and process reform which attracts non-traditional defense vendors and increased competition.
- Organizational Conflict of Interest Reform to increase effective competition. A Multi-Industry Association OCI Working Group has been engaged in this initiative for the past two years.

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The Multi-Industry Association OCI Working Group was formed with several principal objectives:

- To review FAR Part 9.5 to assure the guidance is consistent, protects effective competition and provides the Contracting Officer the requisite information and guidance to exercise sound judgement regarding OCI issues.
- That any proposed revisions maintain the principal function of OCI process: "To level the playing field in competitive procurement and serve as a means of protecting the government's interest in sole source procurement."
- Achieve industry consensus by both large and small business in any proposed revisions.

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Can Government & Industry Adjust?

Principle OCI Concerns from an Industry Point of View:

- The authors of the current OCI guidance did not contemplate today's environment of economic conversion and defense downsizing.
- The existing regulation threatens effective competition on the public side.
- The exercise of the existing regulations discourages long-term planning and investment, and it promotes the erosion of technological capacity on the private side.

Background

- The Multi-Industry Association OCI Working Group is represented by **AIA, NDIA, PSC** and **EIA**.
- This working group was formed at the request of the Air Force, having a stated concern that effective competition can be threatened by the mergers and business combinations occurring within the Defense Industrial Base.
- The Working Group was challenged to review FAR 9.5 and secure industry consensus on appropriate revisions.
- The Industry proposals were briefed to Mrs. Eleanor Spector and the principal leadership of the DFAR Council on May 7, 1998.

OCI Recommendation #1

Adopt an OCI policy favoring mitigation and waiver, over recusal and divestiture.

- ☒ Amend 9.500, Scope of Subpart, to establish OCI mitigation as a preference to “avoidance” mechanisms.
- ☒ Amend 9.506 (c) (2), Procedures, to recognize the potential negative impact on competition by avoidance.
- ☒ Amend 9.504 (a) (2), Contracting Officer Responsibility, encouraging mitigation over avoidance when balancing the effects on competition.
- ☒ Amend 9.507.2, emphasizing that restraint or exclusion are not preferred over alternatives to mitigate or neutralize OCI.

OCI Recommendation #2

During Air Force coordination, it was suggested that the mitigation process be standardized to limit disparate treatment of OCI. The Government should develop and implement a mitigation standard where each agency utilizes the same or similar control mechanism.

☒ Amend 9.500, Scope of Subpart, by adding paragraph (e) to highlight the need to ensure consistency and uniformity in the resolution of significant Organizational Conflict of Interest issues.

OCI Recommendation #3

Revise 9.501, Definitions, to establish within the Subpart a definition for a "Contractor":

☒ *A "Contractor" means an entity (such as an individual, partnership, corporation, educational institution, nonprofit or not for profit organization or business segment) legally capable of entering into a contract or subcontract in its own name or an entity, business segment or distinct business activity under the common control or influence of the same legal entity.*

This definition was extracted from CAS 410.30 (7) and FAR 3.104-4 to recognize entities made up of multiple corporations and those with business segments under a single corporate structure, partnership or sole proprietorship. This change further provides practical examples to support the Contracting Officer's judgment.

OCI Recommendation #4

Establish an effective measure to identify the presence of an Organizational Conflict of Interest.

- ☒ Amend 9.501, Definitions, by removing the undefined term “Perceived” and replace it with “Significant”. Define “Significant” as being of such magnitude or import as to be prejudicial relative to others.
- ☒ Amend 9.502, Applicability, adding a new paragraph (c) and renumbering the previous paragraphs to recognize that an unfair competitive advantage must be prejudicial to

OCI Recommendation #5

OCI regulations should provide guidance to limit "after-the-fact" or retroactive applications of OCI restrictions.

- ☒ Amend 9.504 (2) (d), Waiver, to state: "the Contracting Officer should limit after-the-fact or retroactive applications of Organizational Conflicts of Interest."
- ☒ Amend 9.504 (2) (e), Waiver, to support the Contracting Officer's judgment by requiring that waiver approvals and denials be documented.

OCI Recommendation #6

The regulatory guidance should permit the government the necessary flexibility to contract for expert advice from a contractor even if such advice may favor a particular capability or product, providing the government has an independent and deliberative capability to effectively evaluate such recommendations.

☒ Amend 9.505, to read, “In instances where the government has the capability to make an independent and deliberate evaluation of contractor activities, the government may, in such instances, make a determination regarding an instant solicitation that the successful offeror would not be deemed to be precluded per se from award of the contract to supply the system

OCI Recommendation #7

Clarify current guidance regarding the automatic application of OCI restrictions to all subcontractors.

Rarely do all subcontractors have access to material creating an OCI.

☒ Amend 9.505-2(a) (1), to limit the automatic application of OCI controls to major subcontractors and allow the Contracting Officer the latitude to determine which subcontracts are “major” in each given situation.

OCI Recommendation #8

Consistent with other regulations, limit lookback for OCI issues to a maximum of 5 years. This change is consistent with the revised DFAR's data rights limitations. Prior activity becomes moot after a reasonable prescribed passage of time.

It seems reasonable that if technical data becomes obsolete after 5 years, knowledge of obsolete data should not create an automatic OCI.

☒ Amend 9.505-2(a)(1), Title, adding subparagraph (iii) "Where the issue or action giving rise to the conflict arose more than (insert number if less than 5) years before, but in no event more than 5 years

OCI Recommendation #9

Provide that OCI provisions are subject to negotiation. The absence of negotiation limits the number of potential offerors and reduces the competitive base. The reduction in the competitive base is a major concern to SAF/AQ.

☒ Amend 9.507-1(d), Solicitation Provision, by adding the statement that "Ordinarily all parts of the proposed restraint should be subject to negotiation." Where applicable, such OCI issues should be resolved at the earliest practicable date.

Benefits of these Recommendations:

- ☒ **Create within Subpart 9.5 the requisite information and authority which supports the Contracting Officer's exercise of judgment regarding OCI issues.**
- ☒ **A stated objective of Acquisition Reform is to rely more upon the sound judgment of the Contracting Officer. The recom-mendations provided are intended to expand, rather than limit, the judgment of the Contracting Officer in addressing OCI issues.**
- ☒ **The exercise of this judgment must involve an integrated assessment of all attendant risk, consequences and trade-offs not now in this guidance:**
  - -- Shift toward mitigation using a prejudicial test of OCI.
  - -- Clarify and define "business segments" and "affiliates."
  - -- Eliminate mandatory "lookback" requirements

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OCI's PRINCIPAL FUNCTION

The OCI process is intended to "level the playing field" in competitive procurements and to serve as a means of protecting the Government's interest in sole source procurement. These purposes must be balanced against the effects OCI can have in the current acquisition marketplace. The expansive use of OCI constraints in the absence of well-considered guidance is inconsistent and self-limiting.